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July 5, 2009

Office of the Secretary
Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue, SE., West Building
Ground Floor, Room W12-140
Washington, DC 20590-0001

RE: Advanced Notice of Proposed Rulemaking DOT Docket ID Number OST– 2009 and Notice of Proposed Rulemaking Docket ID Number OST-2009-0081

Los Angeles County Metropolitan Transportation Authority (LACMTA) welcomes the opportunity to provide comments to the Advance Notice of Proposed Rulemaking (ANPRM), Docket ID Number OST-2009 and to the Notice of Proposed Rulemaking (NPRM) Docket ID Number OST-2009-0081. Comments provided by LACMTA are in response to (1) counting credit for items obtained by DBEs from non-DBE sources and (2) contract unbundling, (3) termination for convenience and substitution and (4) process of setting annual goals.

I. Counting Credit for items Obtained by DBEs from Non-DBE Sources

The Los Angeles County Metropolitan Transportation Authority (LACMTA or Metro) recommends Option #1, leaving the basic structure of 49 CFR §26.55 as it is. While §26.55 is inconsistent, the regulations explain the rationale for the inconsistencies and based on our experience, we find the rationale in the regulations to be justified and not without merit.

LACMTA's own files contain two examples justifying counting credit obtained by DBEs from non-DBE sources as is currently provided in the regulations. The following scenarios are evidence of how 49 CFR §26.55 works to resolve DBE compliance issues differently between two different sets of facts in two different contracting situations.

Scenario #1
An LACMTA prime contractor wanted to enter into an agreement with its DBE subcontractor whereby the prime would lease vehicles to its DBE (cars and flatbed trucks). The prime sought permission to credit the leasing fees its DBE subcontractor would pay them (the prime) towards the prime's DBE commitment. Metro disapproved the crediting of payments toward DBE participation in this situation.

The DBE's inability to provide the Prime this DBE credit became an obstacle for vehicle leasing. The DBE subcontractor would have paid the Prime $500 per month for ten vehicles leased from the Prime. The Prime would invoice Metro for payments received from the DBE subcontractor. At the end of the lease, the DBE subcontractor would have the option of purchasing the vehicles. This was not an arms-length transaction.

Metro relied on the guidance provided by 49 CFR 26.55, in its response to the prime and DBE subcontractor.

Scenario #2
LACMTA had to determine whether a DBE Prime, an accredited reseller and integrator of network communications equipment, would be performing a commercially useful function if its non-DBE subcontractor supplied major equipment estimated at over 90% of the total contract cost. The DBE prime would perform less than 30% of the work with its own work force - as required in 26.55(c)(3).

LACMTA relied on 49 CFR §26.55(c) when considering the following facts:

1. The DBE prime was directed by Metro, in the solicitation, to structure the transaction as it did with requirements stated as performance specifications.
2. The DBE Prime was responsible for selecting, modifying, and installing the equipment selected by the DBE and was responsible for the equipment performing as specified.
3. The DBE prime used a profit margin and markup to calculate the selling price of each line item included in their price bid.
4. The DBE Prime purchased the transmission equipment from the non-DBE subcontractor.
5. The transmission equipment was shipped to the DBE prime for further modification and upgrades to meet the performance standards.
6. The DBE Prime modified the equipment to perform to Metro specifications before it was installed by the DBE Prime on Metro premises.

Initially, LACMTA determined that, in accordance with §26.55, the DBE prime did perform a commercially useful function. There appeared to be no evidence that the DBE prime performed 30% or more of the total cost of the contract, as required by of §26.55(c) (3). However, after analyzing and re-reading the evidence, it was apparent that the DBE prime was responsible for execution of the work scope and that the DBE prime carried out its responsibilities by actually performing, managing and supervising the work to LACMTA's

performance standards. The DBE was in fact, responsible for negotiating, determining quality and quantity, ordering the transmission equipment, paying for the transmission equipment and installing it. There was no evidence showing that the role of the DBE was limited to that of an extra participant in a transaction since in this transaction there was no other participant. The DBE prime alone was responsible for selecting the equipment suitable for Metro's needs, planning and executing the modifications called for by the performance specifications and installing the equipment as modified to meet the requirements.

The different facts in each scenario meant that LACMTA came to different conclusions, but both conclusions were based on the criteria readily available in the existing language of 49 CFR §26.55.

II. Contract Unbundling

Unbundling is a technique that may help increase the opportunity for small business participation on federally funded contracts. There have been numerous attempts at unbundling LACMTA contracts, but few proven successful. Unbundling of federally funded transportation construction contracts in our opinion is likely to become a common practice in transportation contracting by recipients of federal financial assistance only if unbundling rises to become federally mandated.

To every extent possible LACMTA, believes that elements of DBE programs should include procedures for facilitating cooperation among small and disadvantaged businesses to enable them to compete for larger contracts. Currently LACMTA does not have "best practices" examples.

III. Termination for Convenience and Substitution

Establishing limitation on the discretion of prime contractors to terminate DBEs for convenience is an issue that LACMTA addressed in its DBE program compliance manual. A copy of our DBE compliance manual is included in all contracts awarded by LACMTA that have DBE commitments. The section of the compliance manual specifies that primes at any tier may not terminated for convenience and then perform the work with its own workforce or that of its affiliate. Failure to comply with will prompt an investigation and administrative remedies under the contract or law.

LACMTA also relies on California State Public Contract Code 4107, which states that A prime contractor whose bid is accepted may not substitute a person as subcontractor in place of the subcontractor listed in the original bid, except that

the awarding authority, or its duly authorized officer, may, except as otherwise provided in Section 4107.5, consent to the substitution of another person as a subcontractor.

If there is a necessity to substitute the DBE subcontractor, primes are "required to provide written notice of any failure in whole or in part to utilize listed DBEs for whatever reason." LACMTA is confident that the termination for convenience and substitution language, included in LACMTA's contract compliance manual adequately addresses concerns referenced in the ANPRM and fulfills the objective of Section 26.53.

Response to Federal Register / Vol. 74 No. 66 / Wednesday, April 8, 2009 / Proposed Rules (Docket ID Number OST-2009-0081) - Action: Notice of proposed rulemaking (NPRM)

I. Process of Setting Annual Goals

LACMTA concurs with the fact that setting annual goals is time consuming and we recommend submitting overall goals every three years. We no objection to staggering recipient submittals, if this options allow time for the Department's review and feedback This options allows recipients ample time for data collection, analysis and suggested adjustment for new opportunities.

Comments made in this correspondence are as a direct result of head-on challenges we face as we meet and strive to improve implementation of LACMTA's DBE Program.

Cordially,

Linda B. Wright
Deputy Executive Officer
Diversity & Economic Opportunity Department

cc: Tashai Smith, Metro

the proposed provision regarding census reporting would be difficult because many educational radio broadcasters do not have automated playlists but rather their playlists are created manually by disc jockeys as they play the music. *See, e.g.*, Comments of WSOU–FM at 1–2. The Judges seek comment on the percentage of broadcasters that do not use automated playlists. Assuming playlists are completely automated, is the cost of preparing a Report of Use likely to rise for a Service which moves from the current 2-weeks per quarter sampling period to full census? If so, by how much will such costs rise? What specifically accounts for any such increase?

For those entities that do not use automated playlists, what means do they use for complying with current reporting requirements? Is all programming on college and other educational stations done manually? Do such stations currently have automated playlist capabilities in place? In other words, does manual programming occur simply as a matter of creative choice? Where a college radio station does not currently have an automated playlist capability, what is the cost of obtaining such a capability? What technologies, if any, are currently employed in complying with the current requirements? Which companies offer them and at what cost? What changes, if any, would be required to comply with the proposed census reporting requirement? What are the likely costs that would be required to move from the current reporting methodology to one that would be required under the proposal? Is technology currently available that would permit entities that do not use automated playlists to comply with the proposed census provision? If so, what companies provide such capabilities and at what cost? If such technology is not currently available, what would be the costs of developing it?

Dated: April 3, 2009.

James Scott Sledge,

Chief, U.S. Copyright Royalty Judge.

[FR Doc. E9–7950 Filed 4–7–09; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 26

[Docket No. OST–2009]

RIN 2105–AD75

Disadvantaged Business Enterprise Program; Potential Program Improvements

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: This advance notice of proposed rulemaking (ANPRM) provides interested parties with the opportunity to comment on five matters of interest to participants in the Department of Transportation's disadvantaged business enterprise (DBE) program. The first concerns counting of items obtained by a DBE subcontractor from its prime contractor. The second concerns ways of encouraging "unbundling" of contracts to facilitate participation by small businesses, including DBEs. The third is a request for comments on potential improvements to the DBE application form, and the fourth asks for suggestions related to program oversight. The fifth concerns potential regulatory action to facilitate certification for firms seeking to work as DBEs in more than one state. The sixth concerns additional limitations on the discretion of prime contractors to terminate DBEs for convenience, once the prime contractor had committed to using the DBE as part of its showing of good faith efforts.

DATES: Comments on this proposed rule must be received by July 7, 2009.

ADDRESSES: You may submit comments (identified by the agency name and DOT Docket ID Number OST–2009) by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: You must include the agency name (Office of the Secretary, DOT) and Docket number (OST–2009) for this notice at the beginning of your comments. You should submit two copies of your comments if you submit them by mail or courier. Note that all comments received will be posted without change to *http://www.regulations.gov* including any personal information provided and will be available to internet users. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://DocketsInfo.dot.gov.*

Docket: For Internet access to the docket to read background documents and comments received, go to *http://www.regulations.gov.* Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Ave., SE., Docket Operations, M–30, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, Room W94–302, 202–366–9310, *bob.ashby@dot.gov.*

SUPPLEMENTARY INFORMATION: The Department is holding a series of stakeholder meetings to bring together prime contractors, DBEs, and state and local government representatives to discuss ways of improving administration of the DBE program. As a result of those discussions, the Department has issued, and will continue to consider, guidance Questions and Answers to help participants better understand and carry out their responsibilities. Addressing other issues raised in the discussions, however, may require changes to the DBE rules themselves (49 CFR Parts 23 and 26). This ANPRM concerns five such issues: (1) Counting of DBE credit for items obtained by DBE subcontractors from other sources, particularly the prime contractor for whom they are working on a given contract; (2) ways of encouraging recipients to break up contracts into smaller pieces that can more easily be performed by small businesses like DBEs, known as "unbundling;" (3) potential ways of improving the DBE application and personal net worth (PNW) forms; (4) potential ways of improving program oversight, and (5) potential ways of reducing burdens on firms seeking certification as DBEs in more than one state.

Counting Credit for Items Obtained by DBEs From Non-DBE Sources

Section 26.55(a)(1) of the Department's DBE rule provides as follows:

(a) When a DBE participates in a contract, you [i.e., the recipient] count only the value of the work actually performed by the DBE toward DBE goals.

(1) Count the entire amount of that portion of a construction contract that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

The preamble discussion of this provision said the following:

The value of work performed by DBEs themselves is deemed to include the cost of materials and supplies purchased, and equipment leased, by the DBE from non-DBE sources. For example, if a DBE steel erection firm buys steel from a non-DBE manufacturer, or leases a crane from a non-DBE construction firm, these costs count toward DBE goals. There is one exception: if a DBE buys supplies or leases equipment from the prime contractor on its contract, these costs do not count toward DBE goals. Several comments from prime contractors suggested these costs should count, but this situation is too problematic, in our view, from an independence and commercially useful function (CUF) point of view to permit DBE credit. 64 FR5115–16, February 2, 1999.

This provision creates an intentional inconsistency between the treatment of purchases or leases of items by DBEs from non-DBE sources. If a DBE contractor buys or rents items from a non-DBE source other than the prime contractor, the recipient counts those items for DBE credit on the contract. If a DBE subcontractor buys or rents the same items from the prime contractor for the DBE's subcontract, the recipient does not award DBE credit for the items.

The policy rationale for this provision, as the preamble quotation notes, is that permitting the prime contractor to provide an item to its own DBE subcontractor, and then claim DBE credit for the value of that item, raises issues concerning whether the DBE is actually independent and performing a CUF. Suppose Prime Contractor A owns an asphalt plant and sells asphalt for a highway construction project to DBE X. Prime Contractor A then claims the value of the asphalt, which its own plant manufactured, for DBE credit. In the Department's view at the time the final rule was adopted, the asphalt represented a contribution to the project by Prime Contractor A, not DBE X. The rule treats the asphalt as material provided by the prime contractor to the project and, consequently, not part of the "work actually performed by the DBE." Therefore, the rule does not permit it to be counted for DBE credit.

In 2007, the Department received a request from the Ohio Department of Transportation for a program waiver of this provision. The Department's response stated the following reason for denying the request:

In reviewing a waiver request, the key point the Department considers is whether granting the request would, in fact, achieve the objectives of the DBE regulation. In this case, the Department believes that it would be contrary to the rule's objectives for the prime contractor to claim DBE credit for the value of its own asphalt, just because the asphalt has passed through the hands of the DBE subcontractor. The asphalt, in this situation, would not represent a contribution to the project by the DBE, but rather part of the prime contractor's work on the project.

Such a result would be contrary to a primary purpose of 49 CFR 26.55, which is to ensure that DBE credit is given only for the contribution to a project that the DBE itself makes. While granting the waiver might permit DBE subcontractors, prime contractors, and ODOT to report higher DBE participation numbers than would otherwise be the case, the reported participation would represent value added by the prime contractor/asphalt manufacturer, not the DBE subcontractor. Doing so would have the effect of permitting prime contractors to meet DBE goals while minimizing the actual contributions they need to obtain from DBEs.

Some prime contractors and DBE contractors have objected to this provision, both in correspondence with the Department and in the stakeholder meeting discussions. They assert that 26.55(a)(1) prevents DBE firms from successfully competing for projects involving the purchase of commodities like asphalt, concrete, or quarried rock, since the DBE credit they could bring to the project would be limited to the installation and labor costs of the job (likely a relatively small percentage of the overall contract). This is particularly true, they say, when there are only one or two suppliers of the commodity within a reasonable distance of the DBE, and those suppliers are owned by or affiliated with a prime contractor. Given that there is a growing perception that independent suppliers of commodities of this kind are being acquired by larger companies, many of whom are prime contractors, many stakeholders believe that this scenario is becoming more widespread.

Participants in the stakeholder meeting discussions also suggested that the current rule could also lead to competitive inequities between prime contractors. For example, suppose Prime Contractor A has an asphalt plant—the only one in the area—and Prime Contractor B does not. Both are bidding on a highway construction contract on which there is a DBE goal. Prime Contractor A cannot count for DBE credit the asphalt that a DBE paving contractor buys, while Prime Contractor B can. This makes it easier for B to meet the DBE goal on the contract.

In thinking about this issue, we have a question about normal industry practices on which we invite comment. Suppose, on a project in which counting DBE participation is not at issue (*e.g.*, a Federal-aid highway contract that has no DBE contract goal, a state-funded project to which the DBE program does not apply, a purely private-sector contract), a prime contractor has a subcontractor who will be doing installation work (*e.g.*, paving, concrete work). If the prime contractor has a manufacturing or distribution facility for the commodity involved, does the prime contractor commonly sell the commodity to the subcontractor, who then is reimbursed by the prime contractor for the sale price as part of the subcontract price? Alternatively, does the prime contractor typically simply make the commodity available on the job site, hiring the subcontractor just to do the installation work? What considerations may affect a decision on this matter?

In response to the concerns that have been expressed at the stakeholder meetings and elsewhere, the Department is seeking comment on four options. All these options focus on the language of the regulation. We do not believe that it is possible to make a reasonable interpretation of the existing regulation that would change the situation about which some DBEs and prime contractors have expressed concern. For example, we do not believe that drawing a distinction between "supplies" and "materials," as some have suggested, is viable. In the absence of "term of art" definitions of these words in the regulation, we rely on their common meanings, which do not differ significantly. Moreover, the policy rationale of section 26.55(a)(1) referred to above applies equally well to asphalt and other bulk commodities, construction equipment, and other items used on a project.

Option 1: No change. Leave the language of section 26.55(a)(1) as it is.

Option 2: Leave the basic structure of section 26.55(a)(1) intact, maintaining the intentional inconsistency between items provided to a DBE by the prime contractor on a given project and items provided by another non-DBE source. However, permit recipients to make exceptions based on criteria stated in an

amendment to the rule. The exceptions would allow counting of items provided by a prime contractor to its DBE subcontractor under limited circumstances. For example, one criterion for granting an exception might be the absence of sources for an item in a given geographic area other than a prime contractor bidding on a project. Another might be a determination by the recipient that allowing items provided by a prime contractor to count for DBE credit is necessary to ensure fair competition among prime contractors. The Department seeks comment on what criteria the Department should propose if we pursue this option, as well as what procedures an amended rule should provide for recipients' exception processes.

Option 3: Amend the rule to permit items obtained by DBEs for a contract to be counted for DBE credit regardless of their non-DBE source. This option would eliminate the current intentional inconsistency by permitting items obtained by a DBE from its prime contractor to count for DBE credit in the same manner as items obtained from other non-DBE sources. This approach would satisfy the objections of some DBEs and prime contractors to the existing counting provision. It would result in a level competitive playing field among prime contractors and among DBEs. It would probably lead to higher reported DBE participation but it would, to some extent, undermine the principle that only the portion of a contract actually attributable to a DBE's own work should be counted for DBE credit.

Option 4: Amend the rule to prohibit items obtained by a DBE from any non-DBE source to be counted for DBE credit. This option would eliminate the current intentional inconsistency by saying that if a DBE obtains items from any non-DBE source, whether the prime contractor or a third party, those items cannot be counted for DBE credit. This approach would result in counting DBE credit in all situations in a way such that only work actually performed by DBEs would result in credit. It would result in a level competitive playing field among prime contractors and among DBEs, but it would probably result in recipients having to set lower DBE goals on some kinds of contracts and to report lower DBE participation numbers.

One concern mentioned in the stakeholder meeting discussion of this issue is that being able to report higher total contract dollars—even if based, in part, on items provided by prime contractors or other non-DBE sources—could be beneficial to DBEs. This was said to be the case because, in effect, it looked good on the resume of a DBE to say that it had completed a relatively large project. Doing so could make it easier for the DBE to grow and build capacity by being able to bid on larger contracts in the future, get larger bonds, etc. The Department seeks comment on how real and important this factor may be, and whether it is a consideration the Department should treat as significant in determining which option to pursue on this issue.

In responding to this ANPRM, we invite interested persons to comment on these four options, how the Department could best structure whichever option it chooses, as well as any other options that commenters think may have merit.

Contract Unbundling

For as long as there have been programs designed to assist small or disadvantaged businesses in obtaining government contracts, "unbundling" has been mentioned as a desirable way of enhancing business opportunities for these businesses. The Small Business Reauthorization Act of 1997 defines contract bundling as " consolidating two or more procurement requirements for goods or services previously provided or performed under separate, smaller contracts into a solicitation of offers for a single contract that is unlikely to be suitable for award to a small business concern." By "unbundling," we mean breaking up large contracts into smaller pieces that small businesses will find it easier to compete for and perform, as well as structuring contracting requirements to ease competition for small firms. Unbundling contracts is cited in the DOT DBE regulation (section 26.51(b)(1)) as one of the race-neutral measures that recipients can take to help meet overall DBE goals.

In the DBE program, as in direct Federal procurement, unbundling historically has been easier to praise than to implement. The reasons why are not hard to understand. Contracting agencies often believe, with some justification, that it is more economically efficient to issue one large contract than to issue a series of smaller contracts. Doing so may also reduce the administrative burdens of the procurement process. In this ANPRM, the Department is seeking comment on what steps—beyond using its bully pulpit to advocate greater use of the technique—the Department might take to foster unbundling.

For example, would it be useful to add to Part 26 a requirement that recipients' DBE programs include specific policies and procedures to unbundle contracts of a certain size that are subject to DBE program requirements? In all design-build contracts, or other types of large contracts involving a master or central prime contractor, should there be requirements that the prime contractor ensure that some subcontracts are structured to facilitate small business participation? When a recipient is letting a race-neutral contract (that is, one without a DBE contract goal), should the terms of the solicitation call on the prime contractor to provide for enough small subcontracts to make it possible for small businesses, including DBEs, to participate more readily? When a recipient has a significant race-neutral component of its overall goal, should the recipient be required to ensure that some portion of the contracts that it issues are sized to facilitate small business participation? Should recipients include, as an element in their DBE programs, procedures to facilitate cooperation among small and disadvantaged businesses to enable them to better compete for larger contracts (e.g., formation of joint ventures among DBEs)?

The Federal Acquisition Regulations (FARs) have procedures and criteria related to unbundling in direct Federal procurement. Do any of the FAR provisions suggest useful ways of approaching unbundling issues in the DBE program?

The Department seeks comment on whether any of these ideas have merit, as well as any other suggestions that interested persons may have to make contracts more accessible to small and disadvantaged businesses. It would be useful for the Department to receive information on "best practices" that recipients have successfully implemented to make contracts more accessible to small businesses.

Revised DBE Certification Application and Personal Net Worth Statement

Under § 26.83(c)(7) of the Regulation, firms applying for DBE certification must use the uniform certification application form provided in Appendix F without change or revision. The application is intended to provide sufficient details concerning a firm so that recipients can determine whether the applicant firm is eligible for the program. Entries are provided to capture details concerning the firm's origination; control by the disadvantaged owners; involvement by directors, employees, and other companies in the firm's affairs; and financial/equipment arrangements. Recipients are permitted (with approval from the concerned Operating

Administration) to supplement the form by requesting additional information.

The Department takes the uniformity requirement seriously. We have heard numerous complaints from DBEs that application materials may differ widely from state to state. We emphasize that all UCPs must use the same, identical DOT form, without change or addition except as specifically approved by an Operating Administration.

We seek comment on what changes to the current application form (Appendix F) could be made to provide a more comprehensive understanding of the business structure and operation of the applicant firm. In particular, what items could be added, revised or eliminated so that recipients can obtain the information they need to adequately assess an applicant's eligibility? We note that several pieces of new information placed on the application could be potentially useful for determining owners' economic disadvantage and their ability to control their business. For example, an applicant's date of birth would assist in determining a proper value for retirement assets under § 26.67(a)(2)(iii)(D), which accounts for assets that cannot be distributed to an individual without significant adverse tax consequences. Under Internal Revenue Service guidelines, a person's age is relevant when making such a calculation; yet the application and tax material submitted in connection with a DBE certification application does not contain the applicant's date of birth.

Questions 11 and 12 (found in Section 4 "Control") request information on the firm's management personnel who may perform a management or supervisory function for another business, or own or work for any other firms that have a relationship with the applicant firm. As written, those questions may not capture other types of employment or activities that persons may be commonly engaged in outside their role with the applicant firm. We believe that the outside activities of a firm's owner(s) and key personnel are highly relevant in determining who at the firm controls each activity for which the firm is seeking certification. If an owner is absent from the firm and performs work (paid or unpaid) elsewhere, this could have an impact on the firm's eligibility. While such information is commonly placed on résumés submitted with the application or obtained during an on-site visit, this is not always the case. Also, not every key person submits his or her résumé and it may be difficult to determine the number of hours devoted to firm activities. Should the application include more details concerning owners' outside employment or other business dealings to include a description of the time spent at these operations and an explanation of how those activities do not conflict with their ability to manage the applicant firm?

A related omission is found in Section 3, Part B, Question 4, which asks for owner's "familial relationship to other owners." This entry does not include an owner's familial relationship to other employees at the firm, any one of whom may have financed the operation or control key aspects of the firm's work. This type of information would not be obtained without probing further during an on-site visit. What items could be added to the certification application that would clarify the roles of the firm's owners and key individuals? What items are missing from the form that are routinely asked during the on-site visit? One such item is the firm's NAICS Code. While an entry exists in Section 2 for a description of the firm's primary activities, it seems necessary for certification purposes for the firm and a recipient to determine which NAICS Codes are applicable. We invite interested persons to comment on these issues and provide suggestions for changes to the certification application form.

The foregoing paragraphs have asked for comment on clarifications or additions to the existing application form. The Department has also heard concerns that the form, as currently structured, is too long and complex, to the point of deterring firms from applying for DBE certification. The Department seeks comment on whether there are ways of significantly shortening or simplifying the form that would continue to give UCPs sufficient information to make informed decisions about firms' eligibility. If commenters have a model of an alternative form in mind, it would be helpful if they would provide a draft copy with their comments.

We also invite comments on an appropriate personal net worth form to be used by each applicant owner claiming to be socially and economically disadvantaged. The current certification application allows applicants to submit their own version of a personal net worth statement, and the Small Business Administration's "personal financial statement" (Form 413) is most commonly used. SBA's form is tailored to its program and the form's headnote asks for completion of the statement by each proprietor, or limited partner with 20 percent or more interest and each general partner; or each stockholder holding 20 percent or more of voting stock; or any person or entity providing a guaranty on the loan. This varies significantly from the DBE program and has caused confusion, as Part 26 requires that only disadvantaged owners claiming ownership of 51 percent of the firm (or a combination of disadvantaged owners holding a majority interest) submit a personal net worth statement. Confusion also stems from the nature of the entries to be completed by the applicant, which are missing information that recipients find useful in verifying the calculation of assets and liabilities. This is particularly the case in the listing of "real estate owned," as the form does not allow easy entry of multiple owners, their relative share of any mortgages, any home equity/secondary loan amounts, and other items.

Should Part 26 specify in greater detail what types of information should be included on an applicant's personal net worth statement and what attachments should accompany the statement? What instructions can be placed on the application to alert owners (and recipients) that all assets are relevant to determining a person's overall net worth? Instructions could specify that items often overlooked or mischaracterized as a joint asset (such as individual retirement accounts, which are never jointly held, or Medical Savings Accounts) should be included on the statement. In addition, how can owners adequately explain whether new assets were purchased with dividends or capital gains that are reported in a tax return, but not reflected on the personal net worth statement? What transactional details such as these should we require applicants to report? Are there financial documents not necessarily related to a person's net worth that are missing but could be relevant to other aspects of the rule, such as W–2 "Wage and Tax" statements showing remuneration of owners and personnel?

We are aware that an expanded form may have the unintended consequence of adding to the paperwork performed by firms and the length of the overall information gathering process, two issues that we hope commenters will also address. As with the application form, the Department seeks comment on whether there are ways of significantly shortening or simplifying the form that would continue to give UCPs sufficient information to make informed decisions about applicants' PNW. If commenters have a model of an alternative form in mind, it would be helpful if they would provide a draft copy with their comments.

The Department also believes strongly that PNW is not the only factor that recipients should consider in

determining whether an applicant is economically disadvantaged. As the Department has said in guidance, there may be situations in which the overall financial situation of an applicant can reasonably suggest that the applicant is not economically disadvantaged, even when his or her PNW falls under the $750,000 cap. For example, if an individual owns a $15 million house with a $14.5 million mortgage, or has numerous vacation properties, or an expensive yacht or horse breeding farm, or lives with family members whose evident wealth is quite high, a UCP might reasonably conclude that he or she is not economically disadvantaged even though he or she may meet the PNW requirements of the rule. The Department seeks comment on how best to apply and describe the economic disadvantage concept in its rules.

Program Oversight

Two stated objectives of the DBE program are to create a level playing field on which DBEs can compete fairly for DOT-assisted contracts and to ensure that only firms that fully meet the eligibility standards are permitted to participate as DBEs. Unfortunately, these objectives have at times been thwarted by DBE program fraud, fronts/pass-throughs, and other nefarious schemes, which have been subjects of great concern to the Department. In 2004, the Secretary of Transportation established a senior-level working group to develop and implement strategies for enhanced compliance, enforcement, and oversight of the DBE program. Combating DBE fraud has become a major emphasis area for the Department's Office of the Inspector General.

While effort at the Federal level is very important, fraud prevention begins at the state and local level. We seek comment on amending the regulation to require recipients to take a more hands-on approach to overseeing the program. The precise nature of what this entails is the subject of this portion of our request for information and we seek input on what revisions could increase the integrity of the program and what best practices exist that recipients could emulate. This includes specific language that could be added to address (1) conflicts of interest within a recipient's certification unit or UCP, (2) general standards and guidance for reviewing their DBE program, (3) the independence and competence of certifiers in the process, and (4) objective and impartial judgment on all issues associated with the DBE program. If additional language would be too cumbersome, are there different measures that would achieve this same result?

Facilitating Interstate Certification

The DBE program is a national program, and many firms are interested in working in more than one state. However, certification proceeds on a state-by-state basis, with each state's UCP operating independently. In the stakeholder meetings and other forums, DBEs and prime contractors have frequently expressed frustration at what they view as unnecessary obstacles to certification by one state of firms located in other states. They complain of unnecessarily repetitive, duplicative, and burdensome administrative processes and what they see as the inconsistent interpretation of the DOT rules by various UCPs. There have been a number of requests for nationwide reciprocity or some other system in which one certification was sufficient throughout the country.

The Department believes that more should be done to facilitate interstate certification. Interstate reciprocity has always been authorized under Part 26 (see section 26.81(a) and (f)), and in 1999 we issued a Q&A encouraging this approach. To further encourage such efforts, the Department issued a Q&A in 2008, providing the following guidance:

WHAT STEPS SHOULD RECIPIENTS AND UCPs TAKE TO REDUCE CERTIFICATION BURDENS ON APPLICANTS WHO ARE CERTIFIED IN OTHER STATES OR CERTIFIED BY SBA? (Posted—6/10/08)

* It is the policy of the Department of Transportation that unified certification programs (UCPs) should, to the maximum extent feasible, reduce burdens on firms which are certified as DBEs in their home state and which seek certification in other states. Unnecessary barriers to certification across the country are contrary to the purpose of a national program like the DBE/ACDBE program.
* In particular, recipients and UCPs should not unnecessarily require the preparation of duplicative certification application packages.
* We remind recipients and UCPs that the Uniform Certification Application Form in Appendix F to part 26 MUST be used for all certifications. The rules do not permit anyone to alter this form or to use a different form for DBE certification purposes.
* The Department strongly encourages the formation of regional certification consortia, in which UCPs in one state provide reciprocal certification to firms certified by other members of the consortium. Consortium members should meet and/or speak with each other frequently to discuss eligibility concerns and approaches to common issues, to conduct training, and for other purposes. Generally, these consortia should be established among states that are located in proximity to one another.
* The Department will closely monitor the efforts of UCPs to reduce burdens on firms applying for certification outside their home states. The Department will determine at a later time whether additional regulatory action is appropriate to prevent unnecessary certification burdens.

Certifications From Other States

* For situations in which a firm certified in State A applies for certification in State B, we suggest the following model. Other approaches are also possible, but the Department believes strongly that all states should put into place procedures to avoid having firms certified in one state start the application process from scratch in another state.
  + Request that the applicant provide a copy of the full and complete application package on the basis of which State A certified the firm. State B should require an affidavit from the firm stating, under penalty of perjury, that the documentation is identical to that provided to State A. It is important that all this material be legible, so that State B can review the package as if it were the original.
  + To ensure that information is reasonably contemporary, State B could have a provision limiting this expedited process to application packages filed with State A within three years of the application to State B.
  + State B should instruct the applicant to provide any updates needed to make the application material current (e.g., changes in personal net worth of the owner, more recent tax returns, changes affecting ownership and control).
  + State B should request State A's on-site review report and any accompanying memoranda or evaluations. State A should promptly provide this material.
  + State B should certify the firm unless changes in circumstances or facts not available to State A justify a different result, or unless State B can articulate a strong reason for coming to a different result from State A on the same facts.

The Department is aware that in one case, Virginia, Maryland, and the District of Columbia have created a "reciprocity" agreement with respect to DBE certification, though it does not have the "rebuttable presumption of eligibility" feature suggested in the Department's Q&A. That is a feature we regard as a key part of an effective interstate certification system. Otherwise, we are not aware of much activity to facilitate interstate certifications and thereby mitigate the problems of which DBEs have spoken. UCP representatives have been very candid in saying that a lack of trust among various state UCPs and a concern about the perceived uneven quality of certifications are obstacles to such action.

Another obstacle to effective interstate certification, and to effective oversight of certified firms generally, is the apparent age of many on-site review reports. A firm may be certified in State

A in Year 1, with no update of the on-site review for many years thereafter. When the firm applies to State B eight years later, State B does not have a reasonably recent on-site review report to use in determining whether the firm is eligible. Even State A does not have recent information to rely upon in determining whether the firm remains eligible. The Department seeks comment on whether it would make sense to require an update of each on-site review report at certain intervals, such as every three or five years. The Department also seeks comment on the impact of such a requirement on UCP resources.

The Department seeks comment on whether we should propose a regulatory requirement along the lines of the idea suggested in the Q&A to begin to surmount the obstacles to facilitating interstate certification. We also welcome ideas about other potential approaches to the issue.

Over the years, interested persons have raised the idea of either nationwide certification reciprocity or Federalizing the certification process. Nationwide reciprocity raises concerns about firms engaging in forum shopping to find the "easy graders" among certifying agencies. Federalizing certification, such as having a unitary certification system operated by DOT, may raise significant resource issues. Such an approach could also result in less local "on the ground" knowledge of the circumstances of applicant firms, which can be a valuable part of the certification process. The Department seeks comment on how, if at all, these issues could be addressed, and whether there is merit in one or another nationwide approach to certification.

Terminations for Convenience and Substitution

Currently, section 26.53(f)(1) tells recipients to

> * * * require that a prime contractor not terminate for convenience a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without your prior written consent.

Under section 26.53(f)(2),

> When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you [the recipient] must require the prime contractor to make good faith efforts to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement.

In recent years, participants in the DBE program have informally told the Department of what they, and DOT staff, regard as a growing problem. For example, a prime contractor accepts DBE Firm A and lists it as the firm that will meet its DBE contract goal. Firm A expends time, effort, and money to prepare to perform the contract, after signing a letter of intent with the prime contractor. Then, after contract award or execution, the prime terminates Firm A for convenience and substitutes DBE Firm B, whose participation is sufficient to meet the goal.

There could be various reasons for such an action. For example, the prime may have been able to negotiate a lower price with Firm B, or the prime has an established relationship with Firm B, and Firm B has just become available to perform the work. In any case, Firm A is left out in the cold. Because the prime contractor did not terminate Firm A for convenience and then perform the work itself, the recipient did not, under section 26.53(f)(1), have to sign off on the substitution. Because the substitute firm is itself a DBE, the prime contractor met its good faith efforts obligation under section 26.53(f)(2).

We are also aware of another concern. Suppose DBE Firm C is performing a subcontract (*e.g.*, in paving). The recipient issues a change order, resulting in a significant increment in the paving work to be done on the contract. The prime contractor, rather than assigning this additional work to Firm C, either does the work itself or assigns it to another DBE or non-DBE subcontractor. In this situation, Firm C, which is already on the job, and on which the prime contractor relied for its original DBE goal achievement, is denied the opportunity for additional work and profit.

The Department is seeking comment on whether we should modify section 26.53 to provide greater involvement by recipients in these situations. For example, we could propose that, when a prime contractor has relied on a commitment to a DBE firm to meet all or part of a contract goal, the prime contractor could not terminate the DBE firm for convenience without the recipient's written approval, based upon a finding of good cause for the termination. This would be true whether the prime contractor proposed to replace the DBE's participation with another DBE subcontractor, a non-DBE subcontractor, or with the prime contractor's own forces. Likewise, we might propose amending section 26.53 to require the recipient to approve a decision by a prime contractor to give a significant increment in the work (*e.g.*, as the result of a change order) assigned to a DBE subcontractor on which the prime contractor had relied to meet all or part of its contract goal to any party other than that DBE subcontractor. The purpose of these ideas would be to make more meaningful the commitment to a particular DBE firm that the prime contractor made as part of the contract award process. We also seek comment on adding a similar requirement for pre-award substitutions in the case of negotiated procurements.

The concept on which we are seeking comment would concern situations where there is a contract goal in a solicitation for the contract. We do not now contemplate proposing such a provision with respect to race-neutral contracts, in which there was not a contract goal. However, we do seek comments on whether a concept of this kind should apply to race-neutral contracts. We also seek comment on whether we should propose any criteria for recipients to apply in deciding whether to approve a substitution, and on what such criteria might be.

Regulatory Analyses and Notices

This ANPRM is a nonsignificant rule under Executive order 12866, because any notice of proposed rulemaking resulting from it will not impose significant costs or burdens on regulated parties. Nor will an NPRM that may follow this ANPRM have significant economic effects on a substantial number of small entities. While the DBE program focuses on small entities, the ANPRM seeks comment on measures that would have the effect of reducing administrative burdens on small entities. At the time of the NPRM, the Department will determine whether it is necessary to conduct a Regulatory Flexibility Analysis.

This ANPRM does not include information collection requirements subject to the Paperwork Reduction Act. The Department does not anticipate effects on state and local governments sufficient to invoke requirements under the Federalism Executive Order. Because it is based on civil rights statutes, this rulemaking is not subject to the Unfunded Mandates Act.

The Department seeks comment on any issues related to the application of these or other cross-cutting regulatory process requirements to rulemaking on the aspects of the DBE program covered by this ANPRM.

Issued this 25th day of March 2009, at Washington, DC.

Ray LaHood,

Secretary of Transportation.

[FR Doc. E9–7903 Filed 4–7–09; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 26

[Docket No. OST–2009–0081]

RIN 2105–AD76

Disadvantaged Business Enterprise; Overall Goal Schedule and Substitution

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice of proposed rulemaking (NPRM) would propose to improve administration of the Disadvantaged Business Enterprise (DBE) program by calling upon recipients of DOT financial assistance to transmit overall goals to the Department for approval every three years, rather than annually.

DATES: Comments on this proposed rule must be received by July 7, 2009.

ADDRESSES: You may submit comments (identified by the agency name and DOT Docket ID Number OST–2009–) by any of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: You must include the agency name (Office of the Secretary, DOT) and Docket number (OST–2009–) for this notice at the beginning of your comments. You should submit two copies of your comments if you submit them by mail or courier. Note that all comments received will be posted without change to *www.regulations.gov* including any personal information provided and will be available to Internet users. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://DocketsInfo.dot.gov.*

Docket: For Internet access to the docket to read background documents and comments received, go to *www.regulations.gov.* Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Ave., SE., Docket Operations, M–30, West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, Room W94–302, 202–366–9310, *bob.ashby@dot.gov.*

SUPPLEMENTARY INFORMATION:

The current DBE rule (49 CFR part 26) requires recipients to submit overall goals for review by the applicable DOT operating administration on August 1 of each year. The process of setting annual overall goals can be time-consuming, particularly given the requirements for public participation by the recipient. The Department's experience has been that many goals are submitted after the August 1 date, and the Department's workload involved in reviewing annual goals from 52 state departments of transportation and hundreds of transit authorities and airports has often resulted in delays in the Department's response to recipients' submissions.

In the Department's 2005 airport concessions disadvantaged business enterprise (ACDBE) regulation (49 CFR part 23), the Department established a staggered three-year schedule for the submission by airports of ACDBE goals. The purpose of this provision was to better manage the workloads of both airports and the Federal Aviation Administration (FAA). This approach appears to have been successful in achieving that objective, and we are now proposing to establish a similar system for Part 26 DBE goals. We seek comment on whether such a system should, like its Part 23 counterpart, permit operating administrations to grant program waivers for different schedules that recipients suggest.

Under the proposal, each Part 26 recipient would submit an overall goal every three years, based on a schedule established by the operating administrations. Some recipients would submit a goal in August 2009, as per the existing requirement. Others would not submit an overall goal until August 2010, and others not until August 2011. With respect to airports, FAA would arrange the schedule so that an airport would not have to submit both a Part 23 and Part 26 goal in the same year. The Department seeks comment on the concept of submitting DBE goals every three years as well as the proposed schedules for submission. We also seek comment on whether the rule should provide for annual reviews of goals or adjustments for new opportunities, similar to what is provided in section 23.45 of the airport concessions DBE rule.

Regulatory Analyses and Notices

The Department has determined that this action is not considered a significant regulatory action for purposes of Executive Order 12866 or the Department's regulatory policies and procedures. The NPRM would ease administrative burdens on recipients by reducing the frequency of overall goal submissions and would improve protections for DBE subcontractors by requiring recipient approval of certain contracting actions.

The NPRM would affect some small entities, easing administrative burdens related to goal submission on any recipients that are considered small entities and enhancing contracting process protections for DBEs, which are small entities. However, the economic effects of these changes on small entities are negligible. For that reason, the Department certifies that the NPRM, if made final, would not have a significant economic impact on a substantial number of small entities.

The Department has analyzed this proposed action in accordance with the principles and criteria contained in Executive Order 13132, and has determined that the proposed amendments are consistent with the Executive Order and that no consultation is necessary. This NPRM does not propose information collection requirements covered by the Paperwork Reduction Act.

List of Subjects in 49 CFR Part 26

Administrative practice and procedures, Airports, Civil rights, Government contracts, Grant programs—transportation, Highways and roads, Mass transportation, Minority business, Reporting and recordkeeping requirements.